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October Term 1981

IN THE

Supreme Court of the United States

RAMAH NAVAJO SCHOOL
BOARD, INC.
and
LEMBKE CONSTRUCTION CO., INC.,

Appellants,

V.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Appellee

ON APPEAL
FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

BRIEF OF RAMAH NAVAJO SCHOOL BOARD, INC. AND LEMBKE CONSTRUCTION CO., INC.

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QUESTIONS PRESENTED[1]

1. Is New Mexico's gross receipts tax repugnant to the Constitution, laws and treaties of the United States because it impermissibly interferes with essential Navajo Tribal relations and self-government by impeding the construction of a school for Navajo children on the Navajo Reservation by Appellant Navajo School Board?

2. Is New Mexico's tax repugnant to the Constitution, laws, and treaties of the United States because it impermissibly burdens, interferes with, and hampers Federal programs to improve Indian education and promote Navajo self-determination?

3. Is New Mexico's tax preempted by Federal laws regulating commercial transactions on the Navajo Reservation.

4. Is New Mexico's tax precluded by the New Mexico Enabling Act and the lack of State jurisdiction over Indians and Indian property on the Navajo Reservation?

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1. The caption lists all parties. Please refer to footnote 1 of the Jurisdictional Statement for compliance with Rule 28.1.

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OPINIONS BELOW

The opinion of the Court of Appeals of the State of New Mexico affirming judgment for Appellee in the trial court is reported at 95 N.M. 708, 625 P.2d 1225 (N.M. App. 1980), cert. quashed 96 N.M. 17, 627 P.2d 412 (1981). The Opinion and Order of the Court of Appeals of the State of New Mexico, July 11, 1980, denying rehearing is unreported but can be found in JS, App. B.

JURISDICTION

This is a civil action for recovery of State gross receipts taxes by a Navajo tribal school board and its non-Indian building contractor. The bases for the claim are that the tax impermissibly interferes with Navajo tribal self-government and that the tax is preempted by Federal laws and the Navajo Treaty of 1868. On July 1, 1980, the New Mexico Court of Appeals affirmed a judgment denying the claim (JS, App. A) and on July 11, 1980, the same court denied Appellants' petition for rehearing. (JS, App. B). On August 14, 1980, the New Mexico Supreme Court granted a petition for writ of certiorari to review the decision of the New Mexico Court of Appeals. (JS, App. C). After briefs were filed, including one from the Navajo Nation as *amicus curiae*, the New Mexico Supreme Court, on March 30, 1981, quashed its writ of certiorari as improvidently granted. (JS, App. D). Notice of appeal to this Court was filed May 11, 1981. (JS, App. I). An amended Notice was filed May 22, 1981. (JS, App. J). This appeal was docketed June 22, 1981. On November 30, 1981, this Court noted probable jurisdiction.

Appellants invoke the jurisdiction of this Court under 28 U.S.C. Sec. 1257(2).

TREATY, STATUTES AND REGULATIONS INVOLVED

1. Treaty of 1868 by and between the United States and the Navajo Tribe of Indians, concluded June 1, 1968, proclaimed August 2, 1868, 15 Stat. 667, 669, Article 6. (JS 10).
2. Statutes:
   A. Appropriations Acts: Public Law 92-369, 86 Stat. 510 (JA 118); Public Law 93-120, 87 Stat. 431; Public Law 93-245, 87 Stat. 1073; Public Law 93-404, 88 Stat. 810; Public Law 94-165, 89 Stat. 985; Public Law 95-74, 91 Stat. 293. (JS 11-12).
   B. The New Mexico Gross Receipts and Compensating Tax Act, secs. 7-9-1 through 7-9-81, N.M.S.A. 1978; and Municipal Gross Receipts Tax Act, secs. 7-19-1, *et. seq.*, N.M.S.A., 1978. (JS, App. K).
   C. The Indian Self-Determination And Education Assistance Act of 1975, 25 U.S.C. 450 *et. seq.*, Public Law 93-638, 88 Stat. 2203. (JS, App. L).
   D. The Johnson O'Malley Act, 25 U.S.C. 452, 48 Stat. 596, as amended, 49 Stat. 1458. (JS 12-13).
   E. 25 U.S.C. 261-264, 19 Stat. 200, 22 Stat. 179, 31 Stat. 1066, 32 Stat. 1009. (JS 13-14, App. to Br. A-10 to A-11).
   F. New Mexico Enabling Act and Disclaimer of Jurisdiction Over Indian Lands, 36 Stat. 558-559 § 2(B); N.M. Const. Art. XXI, sec. 2. (JS, App. M).
   G Snyder Act, 25 U.S.C. 13, 42 Stat. 208. (JS, App.N).
3. Regulations:
   A. 25 C.F.R. Parts 271 and 274. (JS, App. O; App. to Br. A-1 to A-3)
   B. 25 C.F.R. Part 31a (JS, App. O; App to Br. A-3 to A-4)
   C. 25 C.F.R. Part 252. (JS, App. Q)
   D. 41 C.F.R. 14H-70. (Appr. to Br. A-4 to A-7).

STATEMENT OF THE CASE

In 1968, the State of New Mexico closed the only high school accessible to the children of the Ramah Navajo Chapter, a political subdivision of the Navajo Tribe. (Tr. 178, 193-194; Ex. P-43, Tr. 181, 184, JA 124; Ex. D-C, Tr. 186, JA 133). As a result, Ramah Navajo high school children were compelled to seek their educations far from home at Federal Indian boarding schools or not go to school at all. (Tr. 52, 115, 178, 181, 219-220, 234, JA 79; Ex. P-12, Tr. 38, 64, 65, 67, JA 116).

After an unsuccessful lawsuit to reopen the school, *Ben Jose v. Gallup-McKinley County School District,* No. 12,913, Eleventh Judicial District of New Mexico. (Tr. 181, 186; Ex. P-43) (JA 124), the Ramah Navajo Chapter, in early 1970, organized its own school board under authority of the Navajo Tribal Council, Title 10, Sec. 51, Navajo Tribal Code. (Tr. 41; Ex. P-1(a), Tr. 38, JA 114; Ex. P-46, Tr. 192, JA 128; Ex. P-4, Tr. 78, 81, 83).

The Chapter instructed the new board to seek funds for and operate a new Chapter-sponsored school on the reservation to replace the one closed by the State. (P-46, Tr. 192, JA 128; P-12, Tr. 38, JA 116; Tr. 178-179). The Board was and is sanctioned as a tribal organization of the Navajo Tribe. (JA 32, 41, 119). Because state incorporation was required by its prospective funding source, the Bureau of Indian Affairs, the Board also obtained a New Mexico nonprofit charter. (Tr. 72, JA 41; JA 51; Ex. P-1, Tr. 38, JA 112-113).

In the spring of 1970, the BIA agreed to provide funds to the Ramah Navajo School Board for operation of a new school program to be housed in the abandoned public school facility in Ramah Village until a new school facility could be built. (Tr. 51, 188, 202; JA 67). The Navajo Tribe contributed money for renovation of this old structure. (Tr. 122).

Using this makeshift facility (Tr. 51), the Board created the first school started from scratch by an Indian community in modern times (Tr. 91). President Nixon hailed this achievement as a "notable example" of Indian self-determination in his Message to Congress on Indian Affairs, July 8, 1970, 6 Weekly Comp. of Pres. Documents (1970) 894, 899. Five years later, the new Executive policy to promote Indian self-determination became codified in The Indian Self-Determination And Education Assistance Act, 25 U.S.C. 450 *et. seq.*, 88 Stat. 2203, the Board contributing to its legislative history. (Tr. 92). *See, e.g.*, Hearings, Congress Subcomm. on Indian Affairs, on S. 1017, June 1 and 4, 1973, at 126-133, 230.

Two years after its formation, with help from Senator Joseph M. Montoya, the Navajo Board successfully solicited funds for design of a new school facility. Pub.L. 92-369, 86 Stat. 510 (Ex. P-21, Tr. 38, JA 118; JA 39-40). In keeping with self-determination, these funds were granted directly to the Board, which proceeded to hire an architect and design its own school. (Ex. P-21, Tr. 38, JA 118, Tr. 116). In 1973, Congress first provided monies for construction of the new school. (JS 11). Because of fear that the BIA might divert these monies for other projects if the appropriation Act did not specifically earmark the funds to the Board, Congress later amended Public Law 93-120 to add such a directive. (JS 11, JA 39,40; Tr. 71).

This amendment removed any uncertainty as to Congress' intentions in three ways. It expressly directed the funds to the Ramah Navajo School Board; it specified that the funds were to be used "for construction of school facilities"; and it omitted language common to appropriations acts by which "not to exceed" so and so much money is allocated to a given project, thus denying the BIA any discretion over how much money would go to the Board.

Three subsequent appropriations were similarly worded, except that these did contain the "not to exceed" language. (JS 11-12). In consequence of these statutes Ramah Navajo School Board has legal title to the facilities. (Tr. 187, Ex. P-29, par. 11, Tr. 38, JA 120).

As with the design, the Board thus became directly responsible for the construction of its own school. (Tr. 60-66, JA 39-41, 49). To proceed with the work, the Board solicited bids from building contractors. Only two firms, both non-Indian owned, responded (JA 33-34, 43). Both treated New Mexico's gross receipts tax as a cost of construction to be passed on to the Board. (JA 33-34, 37-38, 58-59, 61, 63). The low bidder was Lembke. It won the award of the first construction contract. (JA 43; Ex. P-34, Tr. 38). In the Board's master contracts with the BIA (P-29, JA 120, P-30, P-31, P-32; Tr. 38 by Stip.), the Board was required to include certain standard clauses governing bonding, pay scales, and pricing among other things in its subcontracts with the builder. (Id. and Tr. 171-172, App. to Br. A-4 to A-7). Each of the Board's contracts with Lembke specifies that Lembke is to pay all "required" taxes. (P-34, P-35, P-36 all at Tr. 38 by Stip. JA 33, 121). However, Lembke, in keeping with standard business practices, insisted that the Ramah Navajo School Board reimburse Lembke for all taxes which the builder thus pays. (JA 58-59, 61; Ex. P-34, Tr. 38; Ex. P-40, Tr. 38).

New Mexico's gross receipts tax, the subject of this action, is universally passed on in this way to consumers in the construction industry. (JA-33-34, 37-38, 58-59, 61, 63). The tax thus operates as a sales tax. Sellers of goods and services act as legally-liable collection agents for the State but consumers actually pay the tax as part of the price charged by the seller. Lembke would not have contracted with the Navajo Board had it not secured a promise of reimburse-

ment for the gross receipts taxes it would have to pay New Mexico. (JA 59).

Starting in late 1974 Lembke proceeded to construct the school. All construction, lasting over five years (P-34, P-34(a), P-35, P-36, all at Tr. 38 by Stip.), occurred on the Ramah Chapter's portion of the Navajo Reservation (JA 33, 38) on Navajo trust lands leased to the Board by the Navajo Tribe. (JA 39). New Mexico levied its tax on Lembke's receipts from the Ramah Navajo school construction project and in turn Lembke charged the full cost of the tax to the Board. As required by Lembke, the Board reimbursed the builder the full amount of the tax. (JA 34). Taxes paid by the Board in this manner by the date of trial totalled $232,264.38 and the Board continued to pay the tax in this fashion on the remainder of work to construct its library (media center), its last phase, pending the final disposition of this case. (JA 27, 34). Lembke has agreed to repay the School Board any rebate or recovery it realizes as a result of this action. (JA 34).

The new facility built by Lembke houses both an elementary and a high school, as well as health and support facilities. (Tr. 244). Enrollment at date of trial was 450 Navajo children, representing 93% of the eligible Ramah Navajo school population. (JA 34). Before formation of the Board, only one or two Ramah Navajos had ever gone to college; since its opening in 1970, the Ramah Navajo school has sent between 50 and 60 Ramah Navajos to college. (JA 52).

In substantial part, however, because of the gross receipts taxes paid on this project to New Mexico, the Board has been unable to complete the educational and related facilities it has planned. (JA 52-53, 70-71). The Board has been forced to convert a planned vocational instruction area into a makeshift cafeteria and still lacks all the

classrooms it needs plus permanent offices, and landscaping. (JA 52-57, 65-66, 68-69, 73-75, 77-78). As a result, the school is overcrowded and the quality of its eductional programs has suffered. (JA 54-56, 65-66, 74-77).

SUMMARY OF ARGUMENT

I. New Mexico's gross receipts tax has impeded a Navajo Tribal school board's construction of a school for Navajo children on the Navajo Reservation with funds appropriated directly to it by Congress.

The tax thus "frustrates tribal self-government, *see, Williams v. Lee,* 358 U.S. 217, 219-220 (1959)," *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463, 483 (1976), because it interferes with an essential function of Navajo self-government, education, "the very foundation of good citizenship". *Brown v. Board of Education,* 347 U.S. 483, 493 (1954).

Education's importance to the Navajo Tribe was first acknowledged by both the Tribe and the United States in the Treaty of 1868, Article 6, 15 Stat. 669, JS 10, under which "the necessity of education is admitted" and under which the United States is obligated to construct and staff school "houses" for every thirty Navajo children of school age who "can be induced or compelled to attend school". Although the United States failed to honor its treaty pledge for many years following the treaty's signing, the Federal Government has recognized a continuing commitment to provide education services to the Navajos under this provision, as noted in *Warren Trading Post Co. v. Arizona Tax Comm'n.* 380 U.S. 685, at 690 (1965). Now the United States as well as the Tribe is committed to local Navajo community control of schools through a process called Indian self-determination designed to put decision-making power over Federal programs, especially education, into the

hands of tribes and tribal organizations. The Ramah Navajo School Board's example helped fuel passage in early 1975 of the Indian Self-Determination And Education Assistance Act, 25 U.S.C. 450 *et. seq.*, (JS 70-71).

In contrast, New Mexico at trial made no effort to justify its tax on the basis of regulatory objectives of any kind or of services or benefits to its ostensible taxpayer, Lembke. Instead, the State attempted to show only that it provides services to Ramah Navajos, a factor which has never been considered dispositive in cases of this sort. *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463, 476 (1976). In any event, the testimony of the State's sole witness was severely impeached. (JA 94-109).

Because balancing the interests in this case clearly favors the Navajo tribal school board, the tax in question must be declared invalid. Imposition of this sales tax, as this Court has characterized the New Mexico gross receipts tax, *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 146 (1973), has resulted in unbuilt classrooms, unbuilt permanent administrative offices, and a makeshift cafeteria, which substitutes for a planned vocational instruction area, among other things, at the Pine Hill School operated by the Ramah Navajo School Board and consequently has had a detrimental effect on the quality of educational programs at the school. The tax has plainly interfered with and frustrated tribal self-government in violation of the rule in *Williams v. Lee,* 358 U.S. 217 (1959).

II. The tax conflicts with a pervasive scheme for the improvement of Indian education, "a major national goal", 25 U.S.C. 450a(c), and for promotion of Indian self-determination, 25 U.S.C. 450a(b). The tax is therefore preempted by Federal law. *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980); *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160 (1980);

Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965).

Myriad Federal laws on Indian education, Indian school construction, self-determination, and this very project, constitute a scheme for the improvement of Indian education generally and for Ramah Navajo children in particular at least as preemptive as the Federal Indian trader regulations involved in *Warren Trading Post Co.* 380 U.S. 685 (1965), where Arizona's gross receipts tax was declared invalid as imposed on a licensed Indian trader on the Navajo Reservation, and *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980); and the forestry regulations in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), where Arizona again tried to tax a non-Indian enterprise doing business with a tribe on a reservation.

Federal policy is firmly committed to provision of adequate educational facilities for Indian children. 25 C.F.R. 31a4(s) (App. to Br.A-4). The State's tax conflicts with this pervasive scheme and its policies in a variety of ways. It hampers the goal of providing Ramah Navajo children "a supportive environment for learning, living and education", 25 C.F.R. 31a.4(s). It inserts financial factors into the calculations of a tribal organization about contracting to construct its own school not contemplated by Congress. 41 C.F.R. Part 14H-70. And it tends to defeat Congress' purpose in the appropriations to this Navajo Board to construct "school facilities".

III. In exactly the same way, New Mexico's gross receipts tax has interfered with another comprehensive Federal scheme involved in this case, the regulation of commercial transactions on the Navajo Reservation under the Indian trader statutes, 25 U.S.C. 261-264 (JS 13-14, App. to Br. A-10, A-11)

Lembke's business activities took place exclusively on the

Ramah Navajo Reservation on Navajo trust lands leased to the Ramah Navajo School Board. (JA 32-33) (Findings 5 and 10, JS 45-46). Those activities encompassed the sale of construction materials approximating one half the cost of the project (Tr. 163-164) as well as actual construction. Under 25 C.F.R. Part 252 (JS 86-87), sales of "goods and services" by non-Indians on the Navajo Reservation require licenses from the Bureau of Indian Affairs. These regulations contrast with the less inclusive, less restrictive Indian trader regulations, which do not expressly encompass "services", applicable to other reservations, 25 C.F.R. Part 251.

Lembke's subcontracts with the Ramah Navajo School Board were subject to intensive administrative agency requirements, especially regarding price, similar to those imposed on the non-Indian forestry transportation company in *White Mountain*, 448 U.S. 136 (1980). (App to Br. A-2 to A-7) The same kind of tax, the same reservation, and the same detrimental impact on the Federal Indian trader scheme that proved critical in *Warren Trading Post Co.* are involved here. Neither the language nor the legislative history of the trader statutes discloses an intent to exclude construction work by non-Indians on reservations from their ambit. Both *White Mountain* and *Central Machinery Co.* are therefore directly on point and dispose of this case.

IV. States may not levy taxes on Indians or Indian property on reservations without express Congressional authorization to do so. This rule and New Mexico's Disclaimer of Jurisdiction over Indian lands, 36 Stat. 558-559, sec. § 2(b), N.M. Const., Art. XXI, sec. 2 (JS 75-76), also preclude extension of New Mexico's tax to Appellant Navajos on the Navajo Reservation. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171, 174-175, 181 (1973).

New Mexico's gross receipts tax is not a true income tax as

labeled by the State. It is a sales tax, as this Court has noted, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145-146 (1973). And see *McClanahan, supra*, 411 U.S., at 174-175, the burden of which is born by consumers.

The Ramah Navajo School Board's non-profit charter (Ex. P-1, Tr. 38, JA 112) restricts its actions to "educational and charitable" activities. It is a school, not a resort. For this reason, the Navajo Board cannot pass on the tax burden involved here to anyone else. As a result its students, 450 Navajos of the Ramah Navajo Chapter, a tribal subdivision, have been forced to make do with facilities less extensive and less complete than contemplated by their own School Board, their Tribe, and the Federal Government. Under the present circumstances New Mexico's tax has operated as a direct tax on a Navajo tribal organization on the Navajo Reservation, (JS 45), and thus violates the *McClanahan* rule.

The decision below therefore conflicts with the clear precedents of this Court and must be reversed. U.S. Const., Art. I, § 8, cl. 3; Art. VI, cl. 2.

ARGUMENT

This case involves a conflict between the taxing power of a State and a comprehensive Federal-Tribal scheme for the improvement of Indian education, "a major national goal." 25 U.S.C. sec. 450a(c). (JS 71).

In similar cases involving non-Indians[2] two related rules

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2. Recent tax conflicts of this sort reviewed by this Court include:
Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965), in which Arizona's gross receipts tax was unanimously declared preempted by federal Indian trader regulations on the Navajo Reservation.
Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1973), in which State cigarette sales taxes and personal property taxes were invalidated as applied to Indian-only transactions on a reservation but which permitted

for decision have been fashioned. First, State action may be invalid because it "frustrates tribal self-government, see *Williams v. Lee,* 358 U.S. 217, 219-220 (1959)", *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463, at 483 (1976); *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 179 (1973). Second, even where there is no effect on tribal self-government, State action may be invalid because "the exercise of such authority may be preempted by federal law." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142 (1980), citing *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685 (1965).

Under either test, New Mexico's gross receipts tax was impermissibly levied on the contractor's school construction

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the State to require Indian sellers to collect cigarette sales taxes from non-Indian purchasers and pay them to the State.

Washington v. Conf. Tribes of Colville Res., 447 U.S. 134 (1980), in which several State taxes imposed on or affecting Indian property were declared unenforceable but State sales and cigarette excise taxes on non-Indians were upheld against a claim of tribal preemption on grounds the economic interest of the Tribe was created solely through an artificial tax haven.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), in which a comprehensive federal scheme regulating and protecting a tribal forestry enterprise was held preemptive of State gross receipts and motor vehicle use and fuel taxes imposed on a non-Indian company doing business wholly within the reservation.

Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980), in which the federal Indian trader statutes were held to preempt an Arizona sales tax imposed on a one-time reservation sale of farm equipment to a tribal enterprise by an unlicensed non-Indian salesman without a permanent business location on the reservation.

Tiffany Const. Co. v. New Mexico Taxation and Revenue Dept., 448 U.S. 902 (1980). No opinion rendered, but the case reversed and remanded in light of *White Mountain* and *Central Machinery,* in a case involving a non-Indian, foreign corporation doing road work on a BIA road on the Navajo Reservation.

receipts from the Ramah Navajo School Board in this case. The Navajo Board paid the tax and could not avoid doing so. Because the question here involves the purported exercise of State authority over a non-Indian company engaged in business activities on the Navajo Reservation, the "inquiry here is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but (calls for) a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 144-145 (1980).

I. NEW MEXICO'S TAX HAS FRUSTRATED A VITAL NAVAJO GOVERNMENTAL FUNCTION AND IS THEREFORE BARRED BY *WILLIAMS V. LEE,* 358 U.S. 217 (1959).

A. The Navajo Tribe's Interests in Completing The Ramah Navajo School Are Fundamental And Have Been Impeded By New Mexico's Tax

At least since its decision in *Brown v. Board of Education,* 347 U.S. 483, 493 (1954), this Court has recognized the central importance of education for effective self-government:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public

> responsibilities, even service in the armed forces. It is the very foundation of good citizenship.[3]

For Navajos, this understanding predates *Brown v. Board of Education* by some eighty-six years. Following their incarceration in an army camp at Fort Sumner, New Mexico, in the 1860's, the Tribe entered into a solemn treaty with the United States in 1868. 15 Stat. 667, 669, JS 10. That treaty contains an entire clause devoted to education opening with these words:

> In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted *****[4]

Despite the treaty language, the United States for many

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[3] Nothing in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1974) detracts from the force of this statement, since *Rodriguez* concerned only the question whether educational malapportionment of school district valuations in Texas should be reviewed under a strict or ordinary equal protection test. The Court held that education is not a fundamental right guaranteed by the Constitution. We, of course, do not argue the contrary, resting entirely on the treaty and laws enacted by Congress which statutorily afford the right to Indians and Ramah Navajos in particular.See *Id.*, 411 U.S., at 30.

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[4] The United States has recognized a continuing commitment to furnish education services to the Navajos under this provision, as this Court noted in *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 690 (1965):

> Congress has since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities. *And in compliance with its treaty obligations* the Federal Government has provided for roads, *education* and all other services needed by the Indians. (emphasis added)

years after 1868 failed to provide adequate education services to Navajos.[5] In fact it was not until after World War II and increasing pressure from the Navajo Tribe that Congress and the Bureau of Indian Affairs made any real effort to fulfill the treaty commitment regarding a school and teacher for every thirty Navajo children of school age, and at Ramah not until 1970.[6] (JA 64; P-12, Tr. 38, JA 116; Tr. 178).

In addition to its actions in support of the Ramah Navajo School Board and the Tribal statements cited above, the importance of education to the Tribe was conclusively established at the trial of this cause through several witnesses. (JA 48-49, 65, 73, 78). Moreover, the State has conceded that "education is clearly a function of self-government" (Tr. 31) and "that education is a sovereign function". (Tr. 335).

This tax has directly interfered with this sovereign function of the Navajo Tribe through its political subdivision,

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5. In World War II, 88% of Navajo males aged 18 to 35 were considered illiterate by the Selective Service system. "The Education of American Indians: A Survey of the Literature", Special Senate Subcommittee on Indian Education, Committee Print, 91st Congress, 1st Session, February 1969, page 13.

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6. In the decades since World War II, the Tribe has taken increasingly vigorous steps to make education a cornerstone of tribal policy. At first these steps were aimed at simply getting Navajo children into school near their homes. Federal policy at the time favored public schools for Indian children, so Navajo tribal actions centered on encouraging Navajo children in the direction of public schools. When Federal policy changed towards self-determination, de-emphasizing public schools, Navajo policy changed accordingly, as seen in the codification of Navajo education laws contained in Title 10 of the Navajo Tribal Code, as well as Exhibits P-3 through P-11 (Tr. 36,78-83, See Exhibit Table JA 10), (App. to Br. A-7 to A-9) (Ex. P-1(a), Tr. 38, JA 114-116)

the Ramah Navajo Chapter, and its educational agency, the Ramah Navajo School Board. The record conclusively establishes that the tax in question has resulted in a direct loss to the Navajo School Board of over $232,000 (and an unspecified additional amount since date of trial). The State so stipulated at trial. (JA 34). The Board's educational program has suffered accordingly. (JA 52-57, 65-66, 68-69, 73-75, 77-78). Finally, the Board, was unable to avoid paying the tax.

The record shows that the economic burden inevitably and unavoidably fell on the Navajo school because New Mexico's tax is almost always passed on to consumers of goods and services, universally so in construction work. (JA 33-34, 37, 38, 58-59, 62, 63). In these circumstances, then, New Mexico's contention that it is only taxing the non-Indian contractor ignores the economic forces surrounding this project. Because of these forces, the tax's effect is indistinguishable from the interference with Navajo education that would have resulted had New Mexico simply enacted a law forbidding the Ramah Navajo School Board's construction of certain educational facilities. The true nature of New Mexico's gross receipts tax, moreover, has not escaped the attention of this Court. When dealing with this very tax in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146 (1973), this Court characterized it as a "sales tax", meaning a tax on consumers rather than an income tax on sellers as labeled by the State.

When demand for construction services is price inelastic,[7] as at Ramah, where it will be remembered there were only two bidders and where the funds at issue could be

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7. See Barsh, "Issues in Federal, State and Tribal Taxation of Reservation Wealth: A Survey and Critique", 54 Washington Law Rev. 531, 537-540.

used only for construction, sellers are economically free to demand that the consumer absorb the tax. Both bidders included the tax as part of their bids and Neil Ullery, Lembke's treasurer, testified that contractors treat the tax as a normal cost of doing business and that they would soon go broke if they did not pass on the tax in this fashion. (JA 33-34, 58-60).

Both New Mexico and Federal courts have acknowledged this characteristic of the New Mexico gross receipts tax. *Evco v. Jones,* 81 N.M. 724, 472 P.2d 987, at 992 (1970), cert. den. 81 N.M. 772 (1970); *Mescalero Apache Tribe v. O'Cheskey,* 439 F.Supp. 1063, at 1072 (D.N.M. 1977), aff'd 625 F.2d 967 (10th Cir. 1980), cert. den. 101 U.S. 1417 (1981). Additionally, because it is a non-profit operation, the Board could not in turn pass on this tax burden to anyone else; the buck literally stopped with the Board, causing a reduction in the quantity and quality of school facilities which could be built. This contrasts with other cases, especially *Mescalero Apache Tribe v. O'Cheskey,* 625 F.2d 967 (10th Cir. 1980), cert. den. 101 U.S. 1417 (1981), relied upon by the State. See, J. Sosa's dissent in *Tiffany Const. Co. v. Bureau of Revenue,* 619 P.2d 1225, 1232-1233 (N.M. 1981).

In this sense the case involves far more than a tussle over money. Since school facilities are essential to education, (JA 73-78) New Mexico's tax adversely affects the physical environment in which learning at Ramah takes place and the consequent development of Indian children and their preparation for life. For this reason, fundamental interests of the Navajo Nation are at stake in this matter.

B. The Federal Government Has a Parallel Concern About Navajo Education, Indian Self-Determination In General And This School Construction Project in Particular.

Commencing in the late 1960s, the United States has been engaged in a vigorous program to improve Indian education. Among the essential means employed in that program is local community control of Indian schools.

When the State of New Mexico closed the old Ramah public high school in 1968, the Senate of the United States was engaged in a massive investigation of Indian education and its abuses.[8] Through a special subcommittee on Indian education, the Senate conducted field hearings for over two years and compiled seven volumes of hearing records. These records and the subsequent report of the subcommittee entitled "Indian Education: A National Tragedy - A National Conteporary Challenge" instantly became, and remain, the seminal documents in the field.[9] The report launched a decade of executive and congressional reform of Indian education, with Ramah serving in part as a model for the later actions. (Tr. 91, 92).

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8. Cf. *Natonabah v. Gallup-McKinley County School District*, 355 F.Supp. 716 (D.N.M. 1973). For history of Indian education see M. Szasz, *Education and the American Indian: The Road to Self-Determination 1928-1973*, Albuquerque; University of New Mexico Press (1974); and Gross, "Indian Self-Determination And Tribal Sovereignty: An Analysis of Recent Federal Indian Policy", 56 Texas Law Review 1195 (1978). In 1976, the Government Printing Office published a Compilation of Federal Laws Authorizing Education Assistance Explicitly For American Indians and Other Native Americans, No. 63-794.

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9. Senate Report No. 91-501, 91st Congress, 1st Session. This document is not part of the record but is a part of the legislative history for the Indian Self-Determination And Education Assistance Act, 25 U.S.C. 450 *et. seq.*, 88 Stat. 2203, January 4, 1975. See, e.g., Senate Report No. 93-682, 93rd Congress 2d Session, page 33.

The report contained truly startling findings regarding Indian education:

In July 1970, the President issued a formal Message to Congress on Indian Affairs.[10] In this Message, the President introduced the current Indian self-determination policy of

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- Drop out rates are twice the national average in both public and federal schools. Some school districts have dropout rates approaching 100 percent;
- Achievement levels of Indian children are 2 to 3 years below those of white students; and the Indian child falls progressively further behind the longer he stays in school;
- Only 1 percent of Indian children in elementary school have Indian teachers or principals;
- One-fourth of elementary and secondary school teachers - *by their own admission* - would prefer not to teach Indian children; and
- Indian children, more than any other minority group, believe themselves to be below average in intelligence. (emphasis original)

Report, *supra*, at IX.

The report went on to single out for criticism federal Indian boarding schools of the type to which Ramah Navajos were sent after the State closed the local public high school, calling them "custodial institutions at best, and repressive, penal institutions at worst.". *Ibid.* at 103.

Of the 60 recommendations made by the subcommittee to improve these conditions, the very first reads:

> That there be set a national policy committing the nation to achieving educational excellence for American Indians; to maximum participation and control by Indians in establishing Indian education programs; and to assuring sufficient Federal funds to carry these programs forward. Ibid., at 106.

The subcommittee also specifically recommended that the BIA contract with "nonprofit corporation(s) with an Indian board of directors" to carry out the goal of community school control, *Ibid.*, at 130, as was done with the Ramah Navajo School Board.

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10. 6 Weekly Comp. of Presidential Documents 1970, 894. This document is not part of the record but forms a part of the legislative history of Public Law 93-638, The Indian Self-Determination Act, 25 U.S.C. 450 *et. seq.*, 88 Stat. 2203. See, e.g., Senate Report No. 93-762, 93rd Cong., 2d Session, page 16.

which the Ramah Navajo School is a major and early manifestation. In addition to marking a major shift in Indian policy compared with the termination policy of the 1950s, the Message is noteworthy because it made an explicit connection between Indian self-government and educational reform for American Indians through community and tribal control of local schools. Said the President:

> One of the saddest aspects of Indian life in the United States is the low quality of Indian education. Drop-out rates for Indians are twice the national average and the average educational level for all Indians under Federal supervision is less than six school years. Again, at least a part of the problem stems from the fact that the Federal government is trying to do for Indians what many Indians could better do for themselves.
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> * * * * *
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> Fortunately, this condition is beginning to change. *The Ramah Navajo community of New Mexico* and the Rough Rock and Black Water Schools in Arizona are notable examples of schools which have recently been brought under local Indian control. Several other communities are now negotiating for similar arrangements. Consistent with our policy that the Indian community should have the right to take over the control and operation of federally funded programs, we believe every Indian community wishing to do so should be able to control its own Indian schools. ***** (emphasis added)[11]

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11. Presidential Message, *supra* at 899.

There followed Congressional assistance to design and plan the Ramah Navajo School.

Then in 1975, Congress enacted Public Law 93-638, The Indian Self-Determination And Education Assistance Act, 88 Stat. 2203, 25 U.S.C. 450 *et. seq.*, relevant portions set out at JS 70. In this Act Congress codified the historic self-determination policy introduced through Executive action in 1970.[12] In its findings, Congress stated that "parental and community control of the educational process is of crucial importance to the Indian people"; and then declared as policy that Congress "recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities. . . ." Congress concluded its declaration of policy by stating that:

> *(A) major national goal* of the United States is to provide *the quantity and quality* of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being. (emphasis added)

25 U.S.C. 450(b)(3), 450a(a) and 450a(c).

Congress' statement draws emphasis from the background of previous Federal actions regarding Indians. For many years the aim was to solve the Indian problem by

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12. One of the Act's chief purposes was to rationalize and streamline the "curious mixture of broad interpretation and unrelated statutes" which the Department of Interior had used "to improve the quality of educational and other services and to promote greater self-determination for Indian tribes". House Report No. 93-1600, 1974 U.S. Code Cong. and Adm. News 7782.

eliminating the Indians (in a political and cultural sense). The means used was the destruction of tribal institutions, a process called termination. Schools were a particular battleground as noted by the Special Senate Subcommitte. (App. to Br. A-9, A-10). The key point to have emerged through the years is recognition that quality Indian education can only be brought about if Indian parents, communities, and tribes are given the opportunity enjoyed by most Americans to control the education of their children in local schools. Outside control of Indian education just has not worked. (JA 72, 79). After many twists and turns, Federal policy is now firmly committed to reforming Indian education through Indian self-determination. Of course, a prerequisite for local Indian control of schools is physical space conducive to health and learning. (JA 73-78); *see,* 25 C.F.R. 31a.4(s), App. to Br. A-4). New Mexico's tax conflicts with this goal.

C. *Against These Vital Tribal And Federal Interests, The State of New Mexico Has Interposed Only General Money-Raising State Interests Which Do Not Justify This Tax.*

In contrast to the paramount commitments of both the Navajo Tribe and the United States to provide Indian children "the quantity and quality of educational services and opportunities" needed to achieve acceptable educational levels, the State of New Mexico interposes only its general interest in collecting revenue. Indeed, at trial, the State made no effort whatsoever to introduce evidence justifing its tax in relation to its ostensible taxpayer, Lembke, or any regulatory purpose and instead focused exclusively on alleged State benefits conferred, mostly indirectly and amorphously, on Ramah Navajos, a consideration that has never served to justify a tax of this

kind for reservation activities affecting Indian interests.[13] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, at 150 (1980); *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463, 476 (1976).

The only noteworthy point about the State's services to Ramah Navajos is that they do *not* include education for more than 90% of Ramah Navajo elementary and secondary school children. (JA 35). Despite its acknowledged State constitutional duty to provide educational services to State's children, (JA 47) the record shows that in 1968 New Mexico abandoned its only high school in the area, failed to provide access to any other public school for the vast majority of Ramah Navajo children (Tr. 178-179), *see*, findings in *Ben Jose, et. al. v. Gallup-McKinley Cty. Sch. Bd.* (JA 124).[14] and provides *no* State educational services including transportation, textbooks, or meals, to the Ramah Navajo

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13. For example, the State's witness attempted to show that Ramah Navajos derive a significant benefit from the New Mexico State Penitentiary located in Santa Fe. (JA 93, 100-101) She conceded however, that the State saves approximately $382,000 per year by not having to pay for education services to 450 Ramah Navajo children. (JA108) She also conceded that she had not taken into account Federal funds which the State receives for the provision of State services to New Mexico Indians (JA 95, 106); had not interviewed any Ramah Navajos (Tr. 306); had not accounted for the economic benefits to the State fisc from the yearly influx of Federal funds financing the operations of the Ramah Navajo School Board, which at the time of trial amounted to some $7,200,000 per year (Tr. 244; JA 100, 104); and was unable to determine that her assumptions as to who were Ramah Navajos were correct, having based her determinations on last names and zip codes. (JA 91, 99-100) In any case, the State conceded that its whole argument based on benefits to Ramah Navajos was irrelevant since this is not a due process case. (Tr. 353)

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14. When the State closed Ramah high school it failed to extend bus

School. (JA 51, 80, 85, 107; Tr. 238).

Under these circumstances it is unconscionable for New Mexico to attempt to justify its tax on the basis of services performed for Ramah Navajos. At best the State has a generalized interest in collecting revenue which cannot be compared with the fundamental interests of Navajo people to educate their children with the assistance of the United States as provided by treaty, statute, Presidential statement, tribal resolution, and specific Congressional appropriations. *White Mountain Apache Tribe,* 448 U.S., at 150.

This Court has repeatedly emphasized that State action intruding upon Indian interests can proceed only "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized." *Williams v. Lee,* 358 U.S. 217, 219 (1959). And *see, McClanahan v. Arizona Tax Comm'n,* 411 U.S. 164, 179 (1973); and *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463, 483 (1976).

Because education is perhaps the single most important function of tribal government, New Mexico's tax has unquestionably affected "essential tribal relations" and impeded Navajo self-government in this case. *Cf. Fisher v. District Ct.,* 424 U.S. 382 (1976).[15] Afterall, it is through

routes into the Ramah Navajo territory thus denying access to the nearest public high school, at Zuni, for most Ramah Navajo children. In doing so, the State flouted a State district court order. The State was able to escape the force of the order for the technical reason that it, as contrasted with its political subdivision the Gallup-McKinley County School District, was not a party. *Ben Jose v. Gallup-McKinley County School District,* 11th Judicial District, No. 12,913. (Ex. P-43, 181, 184; Ex. D-C, Tr. 186, JA 139).

15. Congress has recently legislated in the field of Indian child welfare, 92 Stat. 3069, 25 U.S.C. secs. 1901 *et. seq.*, further emphasizing the sensitive nature of this subject by protecting tribal interests in the custody of their children.

its children that the identity and character of a community are determined. *Wisconsin v. Yoder,* 406 U.S. 205, 218 (1972). By undermining a partnership between Congress and a remote Reservation Indian school board, the State's action here intrudes directly into essential tribal affairs in much the way it did in *Fisher.*

Where the burdens placed on tribal governmental activities are as plain, direct, unavoidable, and substantial as those here, the State's action cannot withstand scrutiny under *Williams v. Lee,* as a variety of other courts have held. See, e.g. *Crow Tribe v. Montana,* 650 F.2d 1104, cases cited at 1110 (9th Cir. 1981). In this case there is no question that State action "frustrates tribal self-government", *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463, 483 (1976); *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164, 179 (1973), and therefore cannot be sustained.

II. NEW MEXICO'S TAX CONFLICTS WITH A PERVASIVE FEDERAL SCHEME TO IMPROVE INDIAN EDUCATION THROUGH THE CONSTRUCTION OF SCHOOL FACILITIES FOR RAMAH NAVAJO CHILDREN AND PROMOTE INDIAN SELF-DETERMINATION.

Quite apart from its effect on Navajo self-government, and in addition to it, the State tax in question here must be declared invalid because "it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941).

We submit that Indian education and school construction on reservations are subjects in which the Federal Government in a variety of ways over a period of many years has identified an interest that is so dominant and overriding

in importance as to completely prohibit New Mexico from engaging, without express authorization, in any activity which impedes, restricts, or burdens that interest. *White Mountain Apache Tribe,* 448 U.S. 136, 149 (1980).

The only express authorization which even remotely touches on the subject of this action is 25 U.S.C. 231, 45 Stat. 1185, as amended, 60 Stat. 962, which empowers States to undertake, with tribal and federal consent, enforcement of their compulsory school (not tax) laws on Indian lands to enhance the federal and tribal objective of educating Indians. In this case, it is plain that New Mexico's tax has nothing to do with enforcement of school laws under Section 231 and, most significantly, that the tax detracts from rather than enhances a joint tribal-federal educational objective.

A. *Indian Education On Reservations Is A Subject Entirely Taken In Hand By The Federal Government.*

We submit further that the Federal government's preemptive purpose is revealed in every single piece of legislation which it has enacted dealing with this subject as it affects reservation Indians. In addition to the history of Federal governmental involvement in Indian education, beginning with the Treaty of 1868, the following should be added:

In 1913, Congress enacted the Snyder Act, 25 U.S.C. 13, 42 Stat. 208, JS 77, granting the Bureau of Indian Affairs broad authority to provide education services to Indians. Approximately half the current budget of the Bureau of Indian Affairs is devoted to education.[16]

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16. E.g., Fy, 1978 Interior Appropriations Act, P.L. 95-74, 91 Stat. 285 and Senate Hearings, Dept. of the Interior and Related Agencies Appropriations, Fiscal Year 1975, 93rd Congress, Second Session, page 615.

In 1934, Congress enacted the Johnson O'Malley Act, 25 U.S.C. 452, 48 Stat. 596, as amended, 49 Stat. 1458, JS 12, to provide authority for the BIA to enter into contracts with a wide variety of entities including private corporations for provision of education services to Indians. It was this law which served as authority for the first contracts for operation of a school by the Ramah Navajo School Board until passage of the Indian Self-Determination Act. (JA 41, 47, 51).

In 1950, Congress enacted the Navajo-Hopi Rehabilitation Act, 25 U.S.C. 631 *et. seq.*, 64 Stat. 44, as amended, 72 Stat. 834. Among the purposes of this Act was to furnish "school buildings and equipment, and other educational measures" for the two tribes.

In 1972, based on the recommendations of the Special Senate Subcommittee on Indian Education and the President's Message to Congress, 6 Weekly Comp. of Presidential Documents 1970, page 894, Congress enacted the first of the Indian education reforms of the 1970s, an Act called The Indian Education Act, Public Law 92-318, Title IV, 86 Stat. 334, 20 U.S.C. 887c, a statute recognizing the importance of parental and community involvement in the educational process.

Then in 1975 Congress enacted The Indian Self-Determination And Education Assistance Act giving Indian tribes and tribal organizations the right to operate major social and educational programs previously operated for them by the Federal government.

Lastly, Congress has continued its drive for Indian educational reform by enacting in 1978 still another statute, The Indian Basic Education Act, Title XI of Public Law 95-561, 25 U.S.C. 2001 *et. seq.* 20 U.S.C. 241aa-241ff, 887c-1, 887c-2, 1221h, 92 Stat. 2312, as amended, 93 Stat. 341. This statute, like the Indian Self-Determination Act, con-

tains specific provisions regarding school construction, evidences a concern that the facilities used for educating Indians be safe and adequate, and restates Congress' policy of local Indian school control.[17] With passage of this Act, Congress has enacted into law almost all of the major recommendations of the Special Senate Subcommittee on Indian Education made less than ten years before.

Together with Congress' stated concern with improving Indian education through community control of schools, 25 U.S.C. 450, 450a, this history of related Federal laws leaves absolutely no doubt that the Federal involvement in Indian, especially Navajo, education and self-determination is fundamental, broad, and pervasive.

B. *The Federal Regulations Covering This Project Are As Preemptive As Those In* White Mountain Apache Tribe v. Bracker, *448 U.S. 136 (1980).*

Under the various Congressional directives just reviewed, the Executive Branch has constructed an intricate regulatory system designed to promote Indian self-determination and educational improvement. Some of these regulations are:

1. *25 C.F.R. Part 271*, Nov. 4, 1975 (App. to Br. A-1; JS 78). This part, consisting of some eighty-four provisions, implements the contracting directive in 25 U.S.C. 450f of the Indian Self-Determination Act. Under this provision, the Ramah Navajo School Board has contracted for operation of its school since passage of the Act. (JA 32-33). The regulations define Indian education as a "tribal governmental function", 25 C.F.R. 271.1(q), and characterize school boards such as Ramah as "tribal organizations", 25 C.F.R. 271.2(r). (JS 80). These regulations assume that the funds to be used by tribal organizations will be Federal.

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17. 25 U.S.C. 2005, 25 U.S.C. 458, 25 U.S.C. 2010.

2. *25 C.F.R. Part 274,* Nov. 4, 1975 (App. to Br. A-1 to A-4, JS 81). This part governs school construction contracts or services for tribally-operated previously private schools under 25 U.S.C. 458, JS 73. The Ramah Navajo School Board falls within the definition of "previously private school", 25 C.F.R. 274.3(n). And see 25 C.F.R. 274.3(r).

A specific provision of these construction regulations empowers tribal organizations such as the Ramah Navajo School Board to contract to build an entire school itself under the Indian Self-Determination Act and subcontract with companies such as Lembke to handle the actual construction work, 25 C.F.R. 274.24, (App. to Br. A-2),[18] thus showing that the Federal agency involved, the Interior Department, contemplates Indian community involvement in construction of school facilities.

3. *25 C.F.R. Part 31a, Oct. 9, 1979* (App. to Br. A-3, A-4; JS 83). This part codifies the Indian education policies of the United States. Most had been articulated in one form

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18. The regulations surrounding Indian on-reservation school construction by "previously private schools" are as detailed and inclusive as those relating to reservation forest products or Indian trading. *White Mountain; Central Machinery Co; Warren Trading Post Co.* See e.g., 25 C.F.R. 274.24(a); 25 C.F.R. 274.46; 41 C.F.R. 14H-70. 632, 803 and 804. (App. to Br. A-2 to A-7). Construction of Phase I on the Ramah School began several months prior to November 4, 1975, the effective date of these construction regulations (Ex. P-34, Tr. 38); However, the BIA had contractually applied their substance to the Ramah School project even prior to November 1975. (Ex. P-29, Tr. 38, JA 120; Ex. P-30, Tr. 38.)

The BIA-Ramah and Ramah-Lembke contracts for Phases II and III of this school project (covering two-thirds of construction) were let after November 4, 1975. (Exs. P-31, P-32, P-35, P-36, all at Tr. 38 by Stip.)

or another for several years.[19] This codification includes policies guaranteeing Indian children schooling as close to home as possible (Section 31a.4(p), day schooling where desired (Section 31a.4(i), and adequate school facilities (Section 31a.4(s).

This sampling of applicable rules governing tribal contracting of BIA education and school construction programs certainly demonstrates the existence of policies for the improvement of Indian education, including construction of schools, as inclusive in intent and therefore as preemptive as were the regulations for the promotion of forest products enterprises on reservations in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980).

New Mexico's tax has clearly interfered with the purposes of each of these numerous statutes and regulations. By diverting a significant portion of funds available for construction, the tax has conflicted with Congress' intentions in its direct appropriations to the Ramah Navajo School Board, as well as with the broad programs and policies which they are a part.[20]

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19. E.g., Footnote 11

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20. The State has argued that these appropriations contain no express exemption from the tax at issue here (Motion 7). However, no express prohibition is needed:

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law**** We have thus rejected the proposition that in order to find a particular state law to have been preempted by operation of Federal law, an express congressional statement to that effect is required.

White Mountain Apache Tribe v. Bracker, 448 U.S., at 143-144, and see 448 U.S., 150-151; *McClanahan v. Arizona State Tax Comm'n,* 411

In short, New Mexico's tax has "disturbed and disarranged" a specific statutory plan for Indian educational improvement devised by Congress in cooperation with the Ramah Navajo School Board. *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S. 685, 691 (1965); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 152 (1980). The tax threatens the evident Congressional purpose to promote better Indian education through self-determination and its specific plan for the Ramah Navajos by reducing the quantity and quality of educational resources available to them, and should be stricken.

III. NEW MEXICO'S TAX ALSO CONFLICTS WITH A COMPREHENSIVE FEDERAL SCHEME REGULATING THE SALE OF GOODS AND SERVICES ON THE NAVAJO RESERVATION.

In addition to its conflict with Federal laws to improve Indian education and Navajo self-government, the New Mexico gross receipts tax in this case also conflicts with the Federal Indian trader statutes as applied to the Navajo Reservation. 25 U.S.C. 261-264, 19 Stat. 200, 22 Stat. 179, 31 Stat. 1066, 32 Stat. 1009, JS 13-14, App. to Br. A-10, A-11.

In prior cases these statutes have been found preemptive of state sales taxes or transaction privilege taxes when applied to non-Indian businessmen engaged in business activities on reservations. In *Warren Trading Post Co. v.*

U.S. 164, 174 (1973); *Bryan v. Itasca County,* 426 U.S. 373, 379, 392-393 (1976). In any event, the New Mexico Enabling Act and Constitutional Disclaimer of jurisdiction over Indian lands, 36 Stat. 558-559, sec. 2(B), N.M. Const., Art. XXI, sec. 2, provides an express prohibition, see *infra,* pages 38 - 39.

Arizona Tax Comm'n. 380 U.S. 685 (1965), the same kind of tax as here and the same reservtion were involved. The Court ruled that the trader statutes are evidence "that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders", *Warren, supra,* 380 U.S., at 690, and that the statutes thus preclude assessment of the tax on the gross receipts of a licensed trader on the Navajo Reservation.

In *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 U.S. 160 (1980), Arizona's transaction privilege tax was imposed on a non-Indian, unlicensed, off-reservation farm equipment salesman who had made an on-reservation sale of farm equipment to an Indian tribal enterprise. The Court applied the *Warren Trading Post* rule to that case, holding that "it is the existence of the Indian trader statutes, then, and not their administration, that preempts the field of transactions with Indians occurring on reservations." *Central Machinery Co., supra,* 448 U.S., at 165.

The State would distinguish these cases on the grounds that construction is a "service" and that the trader statutes only apply to sales of goods. (Motion 9). It claims that "multi-million dollar construction contracts" are somehow exempted from the purview of those statutes. Of course, these statutes have been law for some time and were drafted in an era when business activities on Indian reservations were referred to as "trading". However, nothing in the statutes' language or history restricts their meaning to dealings in trinkets. It would be a strained interpretation indeed to read the terms "trader" and "trade" in a restrictive way by excluding those business activities by non-Indians on reservations, such as large-scale construction projects, that have the most economic impact, especially since 25 U.S.C.

262, enacted several years after Section 261, is not restricted to "goods".

Moreover, the Bureau of Indian Affairs has construed the Indian trader statutes to apply to sales of both goods and *services* on the Navajo Reservation, 25 C.F.R. Part 252, JS 86-87, and elsewhere. Cf. *Mescalero Apache Tribe v. O'Cheskey,* 625 F.2d 967 (10th Cir. 1980), cert. den., 101 S.Ct. 1417 (1981), in which the BIA had licensed building contractors under 25 C.F.R. Part 251.

The State's attempt to exclude construction "services" from the purview of the trader statutes, citing *Mescalero Apache Tribe v. O'Cheskey,* thus fails for an elementary reason. The trader regulations applicable to the Mescalero Reservation, 25 C.F.R. Part 251, are not the same as those applicable to the Navajo Reservation, 25 C.F.R. Part 252. In contrast with Part 251, Part 252 expressly covers sales of services as well as goods, 25 C.F.R. 252.3(1), JS 87.

Lembke's construction activities at Ramah unquestionably constitute a "reservation business" within the meaning of that term in the regulation. The Pine Hill construction site of the new school constitutes a "fixed location" within the reservation, and the activity performed by Lembke involves the sale of both goods and services. In consequence, the licensing requirement of 25 C.F.R. 252.5(a) applies to Lembke just as its counterpart did to the unlicensed salesman in *Central Machinery* and the licensed trader in *Warren Trading Post.* Therefore, the attendant interference with the comprehensive Federal trader licensing scheme created by New Mexico's tax is comparable.

Part 252 is noticeably more stringent and broader than those in Part 251 because the Navajo regulations derive from a judgment against the Bureau of Indian Affairs awarded to individual Navajos and the class they represented. *Rockbridge v. Lincoln,* 449 F.2d 567 (9th Cir.

1971). That action involved a claim that the Secretary of Interior had not properly implemented the trader statutes on the Navajo Reservation. After the decision by the Ninth Circuit, the Secretary promulgated the present regulations, 40 Federal Register 39835, August 29, 1975.[21]

If a State tax on a single transaction by an unlicensed, off-reservation-based, non-Indian equipment salesman involving an approved sale to Indians on a reservation is preempted by the less restrictive non-Navajo trader regulations, then a similar tax imposed on proceeds from a multi-million dollar, multi-phase construction project carried on over five years at a fixed site on the Navajo Reservation by a non-Indian, unlicensed contractor hired with BIA concurrence (Exs. P-29, P-30, P-31, P-32, all at Tr. 38; JA 42-43, 120; App. to Br. A-2 to A-7) and subject to BIA control (Ex. P-29, Tr. 38, JA 120) is also preempted.

IV. THE RULE IN *McCLANAHAN V. ARIZONA STATE TAX COMM'N,* 411 U.S. 164 (1973), INDEPENDENTLY BARS NEW MEXICO'S TAX IN THIS CASE.

In *McClanahan, supra,* at 171, 181, this Court invalidated an Arizona personal income tax levied on a Navajo living and deriving her income on the Navajo Reservation because the tax conflicted with the principle that States may not exercise jurisdiction over Indians or Indian property on Indian reservations without express congressional authorization. Since *McClanahan* was decided, the Court has applied the same principle in *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463 (1976), voiding a Montana property tax on motor vehicles owned by reservation Indians; in *Bryan v. Itasca County,* 426 U.S. 373 (1976), strik-

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21. The case implicitly held that the trader statutes do cover "services" on the Navajo Reservation, a ruling which pre-dates the Ramah School construction project by several years. 449 F 2d 567 (9th Cir. 1971).

ing down a Minnesota property tax on a mobile home owned by a reservation Indian in a P.L. 280 state; and in *Washington v. Conf. Tribes of Colville Res.*, 447 U.S. 134 (1980), invalidating Washington's property tax (labeled an excise tax) on reservation Indian-owned motor vehicles.

The *McClanahan* principle has not yet been applied to void a State tax, such as New Mexico's, whose legal incidence nominally falls on a non-Indian. However, in this case the facts clearly establish that New Mexico's gross receipts tax operates as a direct and unavoidable burden on reservation Indians as consumers of construction work, rendering the State's characterization of the legal incidence of its tax completely misleading. In Indian tax cases, this Court has always been quick to pierce legal fictions and reject State or Tribal tax characterizations which conflict with economic reality. *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 164 (1980); *Washington v. Conf. Tribes, supra*, 447 U.S., at 163-164; *Moe v. Salish and Kootenai Tribes, supra*, 425 U.S., at 481-482; and *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930), where the rule applicable to Indian cases was expressly laid down:

> Where a federal right is concerned we are not bound by the characterizations given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal rights asserted.

Whatever the efficacy of "legal incidence" analysis in other contexts, the term operates as a fictional label where a consumer, such as this Navajo Board, must accept the true incidence of the tax and is not able to pass on the burden to anyone else.[22] Thus, New Mexico's reliance on non-Indian

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22. See Justice Dan Sosa's dissent in *Tiffany Construction Co. v. Bureau of Revenue*, 619 P.2d 1225, 1232-1233 (N.M. 1981) on remand, a case involving New Mexico's gross receipts tax imposed on a foreign, non-

sellers of goods and services to collect the tax from Indians in this case for payment to the State should not cloud the underlying actuality that it is the Ramah Navajo School Board and its children who were forced to absorb this tax by sacrificing school facilities.

Where in cases such as this the non-Indian party's involvement is merely nominal, serving only as a conduit from the Indian party to the State, and where an admittedly sovereign function of an Indian tribe is unavoidably

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Indian contractor for road work wholly within the Navajo Reservation involving no other contacts with the State of New Mexico. The Senior Justice took exception to the majority's reliance on *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10th Cir. 1980), cert. den., ____ U.S. ____ (1981), in rejecting Tiffany's claims once again, by saying:

> The majority here upholds the State tax because it is a tax which falls directly upon the contractor and only indirectly upon the tribe. They cite *Mescalero* for the proposition that an indirect tax on Indians is permissible, but fail to recognize that the indirect tax in *Mescalero* could be "passed on as the Tribe engages in its resort and other business" (625 F. 2d at 972), whereas the tax in this case cannot be passed on to anyone except the tribe itself. This, then, is the key distinction between the *Mescalero* case and this case since the Tenth Circuit Court of Appeals repeatedly emphasized the fact that the tax could be passed on to the consumer. In addition, the construction of a resort complex is in the nature of a proprietary project of the Tribe for tourist consumption, whereas a road is in the nature of a public or governmental function which provides an essential service to the Tribe.

Tiffany Const. Co. v. Bureau of Revenue, on remand, 629 P.2d 1225, 1232-1233 (N.M. 1981).

At least one court has recently held that state taxation of non-Indians engaged in commercial ventures on Indian reservations under contract to tribes may impermissibly impair tribal self-government in violation of the rule in *Williams v. Lee*, 358 U.S. 217 (1959), even where the tribal/non-Indian venture is pecuniary or proprietary in nature. *Crow Tribe of Indians v. State of Montana*, 650 F. 2d 1104, 1115-1117 (9th Cir. 1981).

burdened by the tax, the strictures against State taxation of reservation Indians or property, *McClanahan, supra,* 411 U.S., at 171, 181; *Bryan v. Itasca County, supra,* 426 U.S., at 376 and note 2, cannot be overcome by "mere nomenclature". *Washington v. Conf. Tribes, supra,* 447 U.S., at 164.

This Court has already recognized that a transaction privilege tax of the kind assessed here when imposed on reservation activities operates as a direct tax on Indians, *McClanahan, supra,* 411 U.S., at 174-175:

> . . . . It cannot be doubted that the reservation lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision. *It is thus unsurprising that this Court has interpreted the Navajo Treaty to preclude extension of state law - including state tax law - to Indians on the Navajo Reservation.* See *Warren Trading Post Co. v. Arizona Tax Comm'n,* 380 U.S., at 687, 690; *Williams v. Lee, supra,* at 221-222. (emphasis added)

Warren, of course, involved imposition of a state gross receipts tax exactly comparable to New Mexico's upon a non-Indian trader on the Navajo Reservation. By citing *Warren,* therefore, as authority for the proposition that states may not tax Indians on the Navajo Reservation, the Court indicated that gross receipts taxes are to be considered taxes on consumers, just as it did in *Mescalero v. Jones,* 411 U.S. 145, 146 (1973), when it referred to New Mexico's gross receipts tax as a "sales tax".

In *Moe, supra,* at 482-483, the Court upheld a "minimal burden" imposed by a state tax law on reservation Indian sellers of cigarettes to non-Indian purchasers upon whom the tax was levied. Here too a State has identified the seller

as that person in a commercial transaction from whom the State can most easily collect its tax. In *Moe,* the seller was an Indian. In this case it is a non-Indian company. In *Moe,* the State imposed legal duties on the seller (to collect the tax) and on the purchaser (to pay it). In this case, the true economic effects are masked by New Mexico's declaration that the legal incidence of its gross receipts tax falls on the seller, even though there is no serious dispute that the tax is passed on to consumers. New Mexico, unlike Montana, relies on economic laws instead of its own statute to place the burden on consumers.

In *Moe* the Court decided the issue on the basis of economic effect, going so far as to state that the Indian seller's obligations did not truly constitute a tax. *Moe, supra,* 425 U.S., at 482-483. The same practical reasoning should apply here. However, because the ultimate (and substantial) economic burden in this case falls exclusively on a reservation Indian school board and its children, *Moe* dictates a ruling forbidding New Mexico's action.

This conclusion receives support from yet another Federal statute. The New Mexico Enabling Act, 36 Stat. 558-559, sec. 2(B), reproduced in the New Mexico Constitution, Art. XXI, sec. 2, set out at JS 75, contains a disclaimer of jurisdiction over Indian lands plus this specific reference to State taxes:

> Nothing herein provided for shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property *outside of an Indian reservation* owned or held by any Indian. . . . (emphasis added)

In *McClanahan, supra,* 411 U.S., at 176, the Court relied in part on the comparable wording of the Arizona disclaimer for its holding. In so doing the Court rejected contentions that the Buck Act, 4 U.S.C. secs. 104 *et. seq.*, conferred the

right to tax on Arizona and that the income tax was somehow not a tax on lands or property of an Indian. In this case, it must be remembered, New Mexico made *no* effort to justify its tax on the basis of services to Lembke or any regulatory objective. It focused solely on Ramah Navajos — over whom it has no jurisdiction.

New Mexico's tax has reduced the "quantity and quality" of school facilities available to Navajo children on Navajo lands, 25 U.S.C. 450a(c). It has thus reduced the uses of real property on an Indian reservation. Its action is therefore barred absent express authorization from Congress, which does not exist. *McClanahan, supra,* 411 U.S. at 171; *United States v. Mitchell,* 100 S.Ct. 1349 (1980); *United States v. Rickert,* 188 U.S. 432 (1903). And see 25 U.S.C. 478b, 49 Stat. 378 (App. to Br. A-11), which safeguards the Navajos' rights, including tax exemptions, existing prior to passage of the Indian Reorganization Act. In the circumstances presented here, New Mexico's tax has operated as a direct tax on Indians or Indian property and is barred under long-established principles of Federal Indian law.

CONCLUSION

For the foregoing reasons, Appellants pray for an order reversing the decision below and remanding with instructions that the court below enter judgment for Appellants with explicit directions that the Appellee Bureau of Revenue be ordered to refund, with interest from date of assessment, the taxes which have been illegally collected,

and for such other and further relief as the Court deems appropriate.

Respectfully submitted:

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